New Mexico Gaming Compact: A New Benchmark

by Stephen Hart

Five tribes in New Mexico are celebrating final approval by the U.S. Interior Department (DOI) of new gaming compacts that will bring stability to the industry. The Navajo Nation, the Mescalero Apache Tribe, the Jicarilla Apache Nation, the Pueblo of Acoma and the Pueblo of Jemez successfully negotiated a collaborative compact with Governor Susana Martinez’s Office, which was ratified by the New Mexico Legislature and, on June 5, received the final nod from the DOI.

History of New Mexico Gaming Compact Negotiations

The 2015 compact is the product of years of good faith negotiations and compromise. The negotiations took several years to reach fruition through a process that was, at times, difficult and arduous. For most of the tribes negotiation began in the spring of 2011. For the Navajo Nation, negotiations began even earlier as the Nation attempted to negotiate a compact in 2010 with the Richardson Administration.

Conclusion of negotiations and approval of the compacts occurred just in time – of the five tribes, four had compacts from 2001 that were set to terminate on June 30, 2015. It was with the possibility of having to close facilities and the risk of losing jobs and much-needed tribal and state revenues, that the parties sought to conclude their negotiations in January of 2015. The 2015 legislative session commenced on January 20, the parties wrapped up negotiations and submitted the compact to the legislature on February 17, and the first hearing occurred on February 24. The final vote ratifying the compact occurred on March 19, two days before the end of the 2015 session.

The 2007 New Mexico Tribal/State Compact Amendments

Complicating the negotiations, the 2001 compact, which was entered into by all gaming tribes in New Mexico, was amended in 2007 by ten of the 22 tribes in the state. In exchange for greater exclusivity and a thirty-year compact the ten tribes agreed to higher revenue sharing and cap of no more than two gaming facilities. Although Navajo, Mescalero, Acoma, Jicarilla and Jemez did not enter in the 2007 amendments – neither Navajo nor Jemez were part of the negotiations – the Governor’s office, not surprisingly, approached negotiations with the belief that the 2007 amendments were the new normal moving forward.

The principal challenge in any multi-party negotiation is to find common ground and eventually a place where all the participants have their needs met. When, as is frequently the case, one party has a preconceived idea of what that common ground is, negotiations bog down and become protracted. It was understandable that the Governor’s office came to the table with preconceptions, it is a tribute to good faith negotiations that they and the five remaining tribes were able to move beyond those preconceptions.

Perhaps the most difficult issue posed by the 2007 amendments was the cap on the number of allowed facilities. Mescalero, Jicarilla and Navajo have large reservations in New Mexico. The Mescalero reservation is 719 square miles, the Jicarilla is 1,364 square miles and the Navajo Nation reservation in New Mexico is 6,550 square miles. The 2001 compact had no facility cap at all, and so it served their long term interest in economic development well.

What’s more, the Navajo Nation negotiated separate compacts with the Governor’s office before the 2013 and 2014 legislative session. For both of those sessions the compacts authorized the Nation to operate a total of five gaming facilities in the state. Therefore, the attempts to ratify a separate compact were unsuccessful largely because other tribes who had entered into the 2007 amendments felt they would be disadvantaged.

In the new 2015 compact, the Navajo Nation compromised by agreeing to a cap on three gaming facilities with no restrictions on the types or number of games, and one facility with limits on the number of allowed gaming machines. Mescalero and Jicarilla agreed to a formula under which they are each allowed two unrestricted facilities and one facility with limits on the number of allowed gaming machines.

The next obstacle posed by the 2007 amendments concerned free play, which allows play on gaming machines initiated by promotional credits provided to patrons for free. The 2007 amendments included language that arguably required that payouts or prizes awarded as a result of free play would not reduce the cash value of the state’s portion of the revenue share. Though the 2001 compact did not have comparable language, it lacked a definition of wager and free play. As a result of the ambiguity, virtually all gaming tribes in New Mexico ended up in a controversy over the treatment of free play.

Because many millions of dollars were at stake over these issues, resolution was not simple; however, the five tribes and the Governor’s office reached a solution requiring free play to be treated consistent with industry standards and Generally Accepted Accounting Principles (GAAP).
Compact Provisions Likely to be Raised in Future Negotiations in Other States

This last of the difficult issues with the 2007 New Mexico compact amendments is certain to be raised in future negotiations in other states. Nothing is discussed and argued over in gaming compact negotiations as much as revenue sharing.

The 2001 compact provided for revenue sharing in the amount of 8 percent of net win from gaming devices, except that if total annual net win from gaming devices was under $12,000, then the amount payable was 3 percent of the first $4 million and 8 percent of all remaining net win. In 2007, the ten agreeing tribes in New Mexico settled with the state on a tiered structure of between 9.25 percent and 10.75 percent of net win, depending upon the amount of revenue generated and when during the thirty-year compact the revenue was generated. There were also provisions for lower revenue sharing for tribes generating less than $15 million annually.

The new 2015 compact provides for revenue sharing in amounts between that which was called for in the 2001 compact and in the 2007 amendments. As with the 2007 amendments, the 2015 revenue sharing is based on a tiered structure, but the model is lower at 8.5 percent or 9 percent in the first years of the compact. Likewise, there are provisions for reduced revenue sharing for tribes generating less than $20 million annually. Though the exclusivity in the 2015 compact is the same as that provided by the 2007 amendments, and though it provides greater protection for individual tribes than the 2001 compact, particularly against expansion of racinos, (combined race tracks and casinos currently legal in ten states), each of the five tribes will pay less revenue sharing under the 2015 compact than they would have paid under the 2007 amendments.

Of course, the general rule is that the state’s share of a revenue agreement always goes up, as compared to the last negotiated compact; however, the case of Rincon Band of Luiseno Mission v. Schwarzenegger 602 F.3d 1019 (9th Cir. 2010), may slow that progression. Rincon addressed the difference between bad faith demands for taxes and appropriate contractual agreements for exclusivity, ultimately preserving the fairness principle intended by the Indian Gaming Regulatory Act. By clearly requiring significant benefits to the tribe and meaningful concessions from the state, the Rincon ruling has provided a tool for tribes’ negotiators to achieve more advantageous terms, or at least moderate the increase of a state’s portion of revenue sharing agreements.

Notably, in its review of the new 2015
compacts, the DOI demonstrated a strong desire to stop state increases in revenue sharing. While the DOI affirmatively approved the 2007 revenue sharing amendments, stating that they were consistent with the Indian Gaming Regulatory Act, the Department allowed the 2015 compact to be “approved by operation of law,” citing concerns with revenue sharing. While the unified position of the five tribes was that they would each receive significant benefits from the negotiated revenue sharing agreement, the DOI called it a “close question.” Considering that the 2015 compact provides lower revenue sharing with the same exclusivity as the 2007 amendments, one would think that it would be an easy call, rather than a close question. Moreover, tribes who entered the 2007 amendments have now themselves requested the ability to implement the new 2015 compact from the Governor and submitted the compact to DOI for approval. Clearly, the DOI is looking to move the needle on revenue sharing, and the Rincon ruling helps in this regard.

A related issue that will also be the subject of future negotiations is internet gaming. Many tribal/state compacts do not mention internet gaming at all. Similarly, many exempt the state lottery from the obligations of the exclusivity provisions of gaming compacts. All of this poses significant risk, particularly if state lotteries continue their aggressive push into internet gaming. The authorization of internet gaming in a state would likely undermine the exclusivity agreement and affect the value of the exclusivity promised by the state by promoting greater competition to the tribes’ casinos.

The 2015 New Mexico compact provides that if the state authorizes internet gaming, the parties will reopen good faith negotiations to evaluate the impact of internet gaming and consider adjustments to the agreement. As this issue is raised in future negotiations, the tribes’ negotiations should continue to push for more protection.

Finally, problem gambling is increasingly a focus for state negotiators. Problem gambling also has the attention of most responsible gaming operators. The simple truth is that the industry needs to be concerned about treatment and other solutions for problem gambling. The 2015 compact addresses problem gambling in the three ways: 1) the gaming operator is obligated to spend .25 percent of gross gaming revenue on the treatment of problem gambling; 2) the gaming operator is also obligated to post signs at all public entrances and exits that help is available if a person has a problem with gambling and 3) the Tribal Gaming Agency shall comply with procedures to allow problem gamblers to voluntarily exclude themselves from gaming facilities statewide.

As state negotiators learn more about gaming, they are bound to recognize the importance of problem gambling programs. In states like New Mexico where there are racinos or casinos in addition to tribal facilities, tribes are very likely to be asked to participate in statewide self-exclusion programs, under which employees are trained to identify self-excluded persons and have them escorted from the gaming facility.

Finally, as the principles of the Rincon case are understood, state negotiators are likely to look for items like problem gambling that they can argue constitute the mitigation of the impacts from gaming and not something requiring significant benefits be given to the tribe.

**Conclusion**

The Navajo Nation, Mescalero, Jicarilla, Acoma and Jemez successfully collaborated to negotiate a new gaming compact in New Mexico that will provide millions of dollars of revenue to tribal and state governments. Each tribe should be commended for the commitment they showed to resolving an array of issues and bringing stability to the state’s gaming industry for the next 20 years. As the 2015 compact has already served as the new benchmark for other tribes in New Mexico, and can be expected to provide insight and perspective to tribes in other states as they seek to renegotiate their gaming compacts.

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